



SENATE REPUBLICAN

POLICY COMMITTEE

Legislative Notice

No. 5

February 28, 2007

S. 4 – “Improving America’s Security Act of 2007”

Calendar No. 57

Reported on February 22, 2007, with an amendment in the nature of a substitute by the Committee on Homeland Security and Governmental Affairs by a vote of 16-0 (with Senator Coburn abstaining); no written report.

Noteworthy

- Yesterday, the Senate voted to invoke cloture on the motion to proceed to S. 4 by a vote of 97-0. By unanimous consent, the Senate begins consideration of S. 4 today. It is anticipated that once on the bill, Senator Reid will offer a substitute amendment as original text for the purposes of further amendments and debate. *This Legislative Notice addresses the Senate substitute.*
- The Reid substitute amendment represents an agreement between the committees sharing jurisdiction over the bill (Senate Homeland Security & Governmental Affairs, Commerce, and Banking Committees). *Note: the provisions contained in S. 184, the Surface Transportation & Rail Security Act, are itemized separately in Legislative Notice No. 4 issued yesterday.*
- On January 9, 2007, the House of Representatives passed its “9/11 Recommendations bill,” H.R. 1, by a vote of 299-128. The Administration issued a 7-page Statement of Administration Policy (SAP) that detailed problems with H.R. 1.
- Several bills passed by the Republican Congress and implemented by the Administration – most importantly the Intelligence Reform Act -- and independent actions of the Bush Administration have addressed all but 2 of the 9/11 Commission’s Recommendations. This bill gives direction to implement some of the 9/11 recommendations that have not been implemented or fully implemented, and it provides other important security enhancements. Only 19 recommendations were addressed in H.R. 1.
- The Majority Leader has indicated that S. 4 will be open to amendments (see possible amendments section at the end).



Highlights

The following highlights summarize possible areas of controversy or would make major changes to current law.

- ***White House Privacy & Civil Liberties Board*** (Title V): This provision is slightly toned down in S. 4 from the provisions of H.R. 1. In granting privacy officers at each national security agency the same authority as Inspector Generals over all (not just privacy) issues, the H.R. 1 provisions are an attempt to make an Inspector General directly answerable to Congress in each of the agencies.
- ***Collective Bargaining rights for TSA employees*** (Title VIII): This provision was added in Committee and would require that TSA collectively bargain with its employees, and strengthen its existing union; it may also permit work slowdowns (Canada's rail system just experienced this) and threaten the nation's transportation system (much like it often has in Europe). The summary below further explains how this provision may pose a serious security risk to the nation's aviation system.
- ***Federal Data Mining Act*** (Title V):¹ It requires each agency to provide public reports (with classified annex) to Congress describing each data mining project, its goals, technology, data sources, and its impact on privacy and civil liberties.
- ***Changes to the Visa Waiver Program*** (Title IV): This provision would modify existing standards for countries to enter the program and permit their nationals to enter the United States for 90 days without a visa (it is anticipated that Poland and the Baltic States would enter the program under this provision).
- ***New Grants Program*** (Title II): A new homeland security grants program is created, providing \$3.105 billion per year for three years to States for further preparedness for terrorist attacks. The grants would be provided to states based primarily on risk (a 9/11 Commission recommendation).
- ***REAL ID***:² There is a strong possibility that an amendment will be offered to stop or delay for two years implementation of REAL ID conditions (i.e., until the next Administration). Standardization of identification documents (such as drivers licenses) was a 9/11 Commission recommendation.

¹ Essentially, this is Sen. Feingold's bill, S. 236, on this point. The bill is pending before the Judiciary Committee.

² Note that REAL ID was intended to address 9/11 Commission recommendation #18, and is based on the fact that the 9/11 hijackers obtained 17 drivers' licenses in Arizona, California, Florida, Maryland, and Virginia (even though some had overstayed their legal immigration status), and used them at the ticket counters to check in for their flight on 9/11/01. They were also used to rent cars, open bank accounts, and meld into American society. See [9/11 Commission staffer] Janice Kephart, "Identity & Security," February 2007.

Background

The nonpartisan National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”) was created to study what government improvements were needed to avoid another 9/11-type terrorist attack in the United States. On July 22, 2004, the Commission issued its final report.³ On December 5, 2005, the Public Discourse Project (made up of former 9/11 Commissioners) issued a “report card” that gave poor grades on implementing some of the 9/11 Commission recommendations (however, they also gave high grades for some implementation, and “dropped” any consideration of some of the recommendations altogether).⁴ Since then, the Administration strived to complete any unfinished work on the recommendations, but the issue became a Democratic standard during the recent Congressional campaigns. (*Note:* for an alternative assessment, the Governmental Accountability Office (GAO) recently published Sensitive Security Information report on “the progress the nation has made in strengthening the critical layers of defense that either were penetrated by the terrorist hijackers of 9/11”).⁵ When control of the House of Representatives passed to the Democrats, they passed H.R. 1 to “demonstrate” that they would implement the recommendations.

The House-passed 9/11 Recommendations bill (H.R. 1).

H.R. 1 has been portrayed as the Democrats’ bill to implement all of the 9/11 Commission recommendations. In reality, H.R. 1 only addresses 19 of the 41 recommendations and of those, 5 are simply addressed with a “sense of Congress” and report requirements. Most of what was proposed is drawn from Republican proposals or existing programs.

Perhaps of equal interest is the fact that H.R. 1 contains a number of items that were not a part of the 9/11 Commission recommendations:

- ***100-percent scanning of maritime cargo:*** Section 501 would institute the provisions of a previously-offered (and defeated) amendment in the Senate for 100-percent scanning of maritime cargo; that amendment failed during passage of the SAFE Port Act because it would grind sea-based commerce to a halt (see RPC policy paper on port security).⁶
- ***Non-proliferation:*** Title XII emphasizes that an important non-proliferation program should be placed under U.N. control. (*Note:* the U.N. has not had a good record on non-proliferation of Weapons of Mass Destruction (WMD) (e.g., in 2006, Iran was elected to serve as vice-chair of the United Nations Disarmament Commission)).
- ***Collective Bargaining at TSA:*** H.R. 1 also includes a provision requiring collective bargaining between Transportation Security Administration (TSA) and its employees whenever schedule changes are needed or employees need to be moved in response to a possible terrorist attack (such as last August’s aviation bomb threat from Britain) or to a natural disaster (e.g., Hurricane Rita). Increased collective bargaining rights may place the nation’s air transportation security system in serious jeopardy.

³ <http://www.9-11commission.gov/>.

⁴ <http://www.9-11pdp.org/>.

⁵ GAO report GAO-07-110SU (December 2006).

⁶ <http://rpc.senate.gov/files/Sep0606PortSecurityLB.pdf>.

The Senate bill (S. 4)

The Senate complement to H.R. 1 is S. 4. Several bills passed by the Republican Congress and implemented by the Administration – most importantly the Intelligence Reform Act -- and independent actions of the Bush Administration have addressed all but 2 of the 9/11 Commission's Recommendations. This bill gives direction to implement some of the 9/11 recommendations that have not been implemented or fully implemented, and it provides other important security enhancements.

In Committee, over 20 amendments were passed "en banc," and a number more were passed individually by voice or roll call votes. Among the amendments put to roll call votes were Senator Lieberman's regarding collective bargaining rights for TSA employees (see also pp. 2 and 8). The vote was a straight 9-8 party-line vote.

Senator Voinovich offered an amendment to modify the visa waiver program so that DHS would be able to allow certain countries (most likely Poland and the Baltic States) to overcome the current requirement that they have no more than 3-percent visa refusal rate (i.e., the percentage of visa applications denied in that country, and correlated to the expected number of visa applicants who will probably not return once in the U.S.). Senator Collins supported the amendment only if her second degree amendment, requiring a system that records 97 percent of visa waiver exits at airports, is in place. By voice vote, the amendment passed with the second degree.

Senator Voinovich also offered an amendment that creates a Deputy Secretary of Homeland Security for Management to improve management issues at DHS; the amendment passed. He also offered an amendment to change the structure of the new grant program so that there would be lower minimum payments to all states; although the amendment initially passed 9-8, it was later reconsidered and redacted 8-9 (with Sen. Tester changing his vote).

A number of amendments offered by Senator Coburn were passed and require regular auditing of grant funds, and prohibitions on the use of those funds. One amendment would have placed a sunset on the homeland security grant program, and that amendment failed in a roll call vote.

Bill Provisions

Title I: Intelligence and Information Sharing:

This title is intended to improve the sharing of intelligence and information within the Federal government and with State, local, and tribal governments. **Subtitle A** would:

- amend the Homeland Security Act to create a Homeland Security Advisory System;
- create standards for state and local intelligence integration and review;
- establish intelligence training for state/ local officers;
- make the Program Manager for the Information Sharing Environment (ISE) permanent;⁷
- attempt to create *incentives* for employees of different agencies to share information by encouraging cash and non-cash awards and recognition for employees for sharing information that prevents a detrimental homeland security incident;⁸ and
- mandate an Administration study to encourage better information sharing by:⁹
 - possibly eliminating agency “originator control”¹⁰ of information;
 - adopting a standard to share data about U.S. citizens and Lawful Permanent Residents;¹¹ and
 - reviewing the possibility of using anonymous data.

Subtitle B creates information sharing partnerships by:

- tying “fusion center”¹² performance to DHS grants;
- encouraging DHS intelligence analysts to staff the centers;
- authorizing \$10 million for each year between 2008-2012;
- creating a fellows program for State, local, and tribal officials to spend time at DHS to learn about intelligence and information sharing.

Subtitle C would codify the existing *Interagency Threat Assessment & Coordination Group* (the group includes state and local participation to determine what federal intelligence products should be disseminated, how those products should be written, and when they should be distributed).

⁷ Section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458.

⁸ This is 9/11 Commission recommendation #34.

⁹ This attempts to address 9/11 Commission recommendations #22 and #35.

¹⁰ “Originator Control” refers to documents that are disseminated based on specific permission by the agency that authors the product.

¹¹ Lawful Permanent Residents refers to persons who permanently immigrate to the U.S. and obtain a “green card.”

¹² “Fusion Centers” already exist at DHS and entail agencies, such as Customs & Border Protection (CBP) and Immigration & Customs Enforcement (ICE), working together in the same office (normally near the border areas).

Title II: Homeland Security Grants:

Title II authorizes a *new* Homeland Security Grant Program. The bill essentially combines the new grant program with the existing Emergency Grant Performance Grant Program (EMPG)¹³ and allocates grants with a minimum 0.75 percent of the grant money per state (the remainder being based on risk factors).¹⁴ The new grant regime would be authorized at \$3.105 billion for each of the next 3 years; and designed to allow State/local governments to respond to natural or terrorist incidents.

The grant program has 4 parts:

- Urban Area Security Initiative - This program is designed for the 100 largest metropolitan areas in the United States (\$1.269 billion).
- State Homeland Security Grant Program - Each state is required to receive a minimum 0.45 percent of the funds under this program (\$913 million). Grants are given to states based on the threat, vulnerability, and consequences of a terrorist incident. *Note:* At least 25 percent (\$548 million) of the overall funding for urban areas and state grants must be used for terrorism prevention activities by law enforcement.
- Emergency Management Performance Grants Program - Each state would receive a minimum 0.75 percent of the funds for the program (\$913 million), with the remaining funds distributed to states in proportion to their population. The grants would be for states to respond to all types of major disasters.
- Emergency Communications and Interoperability Grants Program - State grants would be for emergency and interoperable communications (authorized separately in Title III of the bill).

Title III: Communications Operability and Interoperability:

This title creates a Federal Emergency Management Agency (FEMA) grant program to improve communications interoperability at State/local areas. States would have to apply for grants based on how the grants would be used to further State-wide interoperability plans and the National Emergency Communications Plan. At least 80 percent of the total grant amount would need to pass to local and tribal governments. A provision is included to pilot test 6 projects along the international land borders to improve interoperability with Canadian and Mexican officials. A minimum of 0.75 percent of these grants will go to each State. The title authorizes \$400 million in 2008, \$500 million in 2009, \$600 million in 2010, \$800 million in 2011, and \$1 billion in 2012. DHS would set up an international border demonstration project involving at least 6 pilot projects aimed at improving interoperability along the Canadian and Mexican borders.¹⁵

¹³ See Robert T. Stafford Disaster Relief and Emergency Assistance Act and Post Katrina Reform Act.

¹⁴ This is 9/11 Commission recommendation #25; it is also discussed in GAO report: GAO-07-258SU and GAO-07-110SU, p. 12. Note: in Committee, Sen. Voinovich pointed out that the existing EMPG (designed for all-hazards events) would be combined with the new grant program and given a formula for distribution that raises the minimum amount provided for each State; his analysis is that this would favor small states over big states.

¹⁵ See 9/11 Commission recommendation #17.

Title IV: Terrorist Travel:¹⁶

Title III makes significant changes to the Visa Waiver Program (VWP).¹⁷ First, DHS would be given flexibility to allow a country entry into the VWP if:

- DHS certifies that an alien-exit system is in place to verify the departure of 97 percent of aliens leaving the U.S. via U.S. airports (and would be required to have 100 percent airport departure exit screening for VWP aliens within 1 year of enactment);¹⁸
- DHS determines that the proposed country has adequately mitigated security-risk measures (airport security, has air marshals, has quality passports), and its entry into the VWP would not compromise U.S. law enforcement and security interests;
- DHS determines that there has been a sustained reduction in visa refusal rates in that country, and considers the estimated overstay rate for its nationals; and
- the country cooperated with the United States on counterterrorism measures and information sharing.

Another change is that the bill would require VWP countries to improve reporting of lost or stolen passports,¹⁹ require VWP countries to share information about prospective visitors, and authorize an advanced “electronic travel authorization” (ETA) system²⁰ so that travelers’ names can be checked against watch lists well in advance of boarding. (Note: very little in the current law²¹ or S. 4 describes the conditions for removing a country from the VWP program should certain economic or security conditions come into being.)

Title III would also authorize more resources for the Human Smuggling and Trafficking Center. DHS would be required to coordinate terrorist travel programs at DHS and National Counterterrorism Center (NCTC). The title would require DHS to conduct a study to reduce fees for passport cards to be used in the Western Hemisphere Travel Initiative. The REAL ID Act would be slightly modified to allow DHS to pilot a program with state drivers’ licenses that could be used to verify U.S. citizenship at the border. (Note: it is anticipated that there will be amendments offered on the Floor to delay or eliminate the REAL ID program.)²²

¹⁶ This is 9/11 Commission recommendation #14. See the National Strategy to Combat Terrorist Travel.

¹⁷ See 9/11 Commission recommendation #16. Note that GAO determined that “visa waiver travelers are not subject to the same degree of screening as travelers who must first obtain visas...[c]onvicted 9/11 terrorist Zacarias Moussaoui is among those who carried a passport issued by a visa waiver country.” GAO-07-110SU, p. 9.

¹⁸ For further information, see Acting Director of US-VISIT, testimony on February 16, 2007, before the House Appropriations Committee, Subcommittee on Homeland Security.

¹⁹ In some cases, it was discovered that lost and stolen passports from one VWP were not reported for over 4 years. Coalition forces found large numbers of VWP passports in al Qaeda hideaways, and except for the new passports with digital photos (and soon will have biometric chips), pictures in passports are easily substituted. See GAO report GAO-06-55SU (November 2006), p. 47, for more information on possible advancements in passenger pre-screening. In some ways, this addresses 9/11 Commission recommendation #17 as well.

²⁰ See GAO report GAO-06-55SU (November 2006), p. 73, on how Australia and New Zealand use this type of system to screen incoming passengers before they arrive on the mainland.

²¹ Immigration & Nationality Act (INA), sec. 217.

²² See 9/11 Commission recommendation #18 to standardize secure identifications. The REAL ID Act (in PL 109-13) was designed to further that goal by encouraging states to upgrade the security standards for their drivers’ licenses (however, easily-counterfeited birth certificates were never addressed). A Federal agency may not accept, for any official purpose, a driver’s license unless it is a REAL ID card (but in many cases, such as airline travel, an American could use a U.S. passport).

Title V: Privacy and Civil Liberties:²³

S. 4 would require that all 5 members of the Privacy and Civil Liberty Oversight Board (PCLOB) be Senate-confirmed for 6-year terms. Up to 3 could be of one party. The PCLOB would have expanded authority to hold public hearings and inform the public of its activities. The Board could request that the Attorney General issue a subpoena to obtain documents and testimony from private parties; if denied, the AG would have to inform Congress. The various national security and intelligence agencies would have to appoint privacy and civil liberties officers who would have almost the same authority as Inspector Generals to review documents and investigate anything within their area of responsibility.²⁴

The “Federal Data Mining Reporting Act” (essentially, Sen. Feingold’s bill, S. 236, on this point) was added to this title in committee. It requires public reports (with classified annex) from each agency to Congress describing each data mining project, its goals, technology, data sources, and its impact on privacy and civil liberties.

Title VI: Enhanced Defenses Against Weapons of Mass Destruction:²⁵

The existing National Biosurveillance Integration Center (NBIC) would be authorized. Its mission would be to promote integration of local and Federal interagency data from human health, agriculture, and environmental surveillance programs to provide comprehensive situational awareness (e.g., pandemic outbreaks). DHS would also be responsible for the implementation of the global nuclear detection architecture.

Title VII: Private Sector Preparedness:²⁶

S. 4 would establish a voluntary certification program to assess whether a private sector entity complies with voluntary national preparedness standards. Representatives from organizations that coordinate and develop voluntary consensus standards²⁷ and DHS would develop preparedness standards and implement the certification program. Under the program, companies wishing to be certified as prepared would have their applications reviewed by third parties²⁸ to determine whether the companies comply with the standards. FEMA regional offices would have to coordinate with the private sector to help ensure private sector preparedness.

²³ This is 9/11 Commission recommendation #24.

²⁴ Note: in H.R. 1, the privacy and civil liberties officers would have authority to investigate anything, even outside their area of responsibilities.

²⁵ This is 9/11 Commission recommendation #12. See the National Strategy to Combat WMD for more information.

²⁶ This is 9/11 Commission recommendation #28.

²⁷ The Committee text was amended to replace American National Standards Institute (ANSI) with language specifying these organizations. ANSI was created by the Homeland Security Act of 2002.

²⁸ Accredited by organizations such as ANSI.

Title VIII: Transportation Security Planning and Information Sharing:²⁹

The National Strategy for Transportation Security is augmented so that DHS can make risk-based priorities based on the vulnerability assessments conducted by DHS. DHS would have to coordinate the development of the Strategy with Federal, State/local governments. The DHS budget and R&D must be tied to the priorities in the Strategy. DHS must ensure that there is greater information sharing with regard to transportation security.

Section 803 of the bill would require the Transportation Security Agency (TSA) to treat all of its employees “uniformly,” and would repeal existing personnel management authorities so that TSA would no longer have the flexibility to move personnel in response to a terrorist incident or other emergency, without first consulting (“collective bargaining”) with the TSA employees union.³⁰ TSA employees can currently join a union; \$160.5 million, or equivalent to 8 percent of the workforce, would be required in the first year to support the collective bargaining environment (according to TSA). (Note: last year, Canadian airports suffered a work slowdown due to collective bargaining issues, and as a result created passenger-line backups and entry of as much as 250,000 passengers onto airplanes without any screening.)³¹

Title IX: Incident Command System:³²

DHS regional responsibilities would include assisting state/local authorities to pre-identify locations for Incident Command System (ICS) set up during disasters. DHS must create a system to inventory resources likely to be used in disaster response. It would also have to credential employees likely to respond to a natural disaster and develop a human capital plan so that it is capable of responding to a cataclysmic incident.

Title X: Critical Infrastructure Protection:³³

DHS must establish and report on a list of critical infrastructure that would cause catastrophic damage if disrupted or destroyed. DHS must perform a risk assessment of all critical infrastructure sectors, and provide Congress with an annual report on the risk assessments performed each year.

²⁹ This is 9/11 Commission recommendation #19.

³⁰ Note that GAO reported, under TSA, “with respect to passenger checkpoint screening – the physical screening of passengers and their carry-on bags – we have reported that TSA has met Congressional mandates related to deploying its federal aviation security workforce and establishing passenger screening operations at over 400 commercial airports ... 100 percent of airline passengers’ checked baggage is now screened.” GAO-07-110SU. pp. 6-7.

³¹ <http://www.cbc.ca/canada/story/2006/12/20/luggage-screening.html>.

³² This is 9/11 Commission recommendation #26.

³³ This is in line with 9/11 Commission recommendation #41.

Title XI: Congressional Oversight of Intelligence:³⁴

The President and Congress would have to declassify the total amount appropriated for the intelligence community. The title also requires more reporting to relevant committees by the intelligence community. Section 1101, for each fiscal year after fiscal year 2007, directs:

- the President to disclose to the public the aggregate amount of appropriations requested for the National Intelligence Program, and
- Congress to disclose to the public the aggregate amount of funds it appropriates to the National Intelligence Program.

Section 1101 further directs the Director of National Intelligence to undertake a study to assess the advisability of disclosing more detailed information about the intelligence community budget.

Section 1102 purports to structure the time and manner in which the intelligence community responds to requests for Congress, as well as authorize intelligence community officials to testify to Congress without authorization from Department heads.³⁵

- As an initial matter, it puts into law that the intelligence community must respond within 15 days to a document or information request.
- It then provides that the intelligence community must provide the documents or information requested “unless the President certifies that such document or information is not being provided because the President is asserting a privilege pursuant to the Constitution.”

Section 1102 then provides that no member of the Executive Branch may require an element of the intelligence community to receive permission to testify, or to require that testimony be approved if such testimony includes a “statement indicating that the views expressed therein ... do not necessarily represent the views of the Administration.”³⁶

Section 1102 then finally purports to provide circumstances under which intelligence community employees may provide classified information directly to Congress without first reporting such information to the appropriate Inspector General, namely when that information is reasonably believed to provide direct and specific evidence of a false or inaccurate statement to Congress.

This provision raises significant Constitutional concerns. When a bill with a similar provision was introduced in the 105th Congress, S. 1668, the Statement of Administration Policy was that: “This provision is clearly contrary to the Supreme Court’s explicit recognition of the

³⁴ This deals with 9/11 Commission recommendation #33.

³⁵ As a policy matter, it would seem that the details of inter-branch information and document requests should be a matter of comity rather than fiat as outlined in public laws.

³⁶ This provision of the bill raises substantial Constitutional concerns. Primarily, this would be a direct intrusion on the ability of the President to control the Executive Branch. United States Department of Justice Office of Legal Counsel, *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 633 (1982) (asserting that a statutory “requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch”).

President's constitutional authority to protect national security and other privileged information. Congress may not vest lower-ranking personnel in the Executive branch with a 'right' to furnish national security or other privileged information to a member of Congress without receiving official authorization to do so. By seeking to divest the President of his authority over the disclosure of such information, S. 1668 would unconstitutionally infringe upon the President's constitutional authority."

Title XII: International Antiterrorism Cooperation:

This title creates a Homeland Security International Cooperative Programs Office in DHS. It would be responsible for developing partnerships with U.S. allies to further homeland security research and development.

Title XIII: Transportation & Interoperable Communication Capability:

Subtitle A (Title XIII) – Surface and Rail Security:

Please refer to Legislative Notice No. 4 on S. 184 issued today as that bill is incorporated into this subtitle.

Subtitle B (Title XIII) – Aviation Security Improvement:

This subtitle is based on S. 509, otherwise known as the "Aviation Security Improvement Act." The 9/11 Commission made recommendations to address air passenger and cargo security (recommendations #20 and #21). It would require DHS to implement the following:

- Screen cargo: within 3 years, to "screen" (vice "inspect" in H.R. 1) all cargo transported or passenger aircraft at a "level of security comparable" (vice "equivalent" in H.R. 1) "to the level of security in effect for passenger checked baggage;"
- Review exemptions: submit a report to Congress and the Comptroller General assessing exemptions from screening for certain types of cargo, GAO will review the report;
- Pilot blast-resistant containers: pilot use of these containers and begin an acquisition;
- Conduct R&D: expedite research and development of technology to prevent an explosive device from being introduced onto a passenger plane (with authorization);
- Screen in-line baggage: provide a report already required under P.L. 108-458, provide grants for small-hub airports (authorizes \$450 million (FY08, 09));
- Lift TSA personnel limits: would not apply;
- Create strategic plan: issue a strategic plan on explosive detection at screening checkpoints;
- Redress: create a redress process for passengers who have been wrongly delayed;
- Create Advanced Passenger Prescreening System (APPS): provide a plan to allow passengers to provide information to DHS in advance of flying so that any issues can be worked out before boarding time; and
- Provide general aviation security grants: study if DHS can provide grants based on a risk-management approach, and if there is a better way to vet air crew for expedited access through screening checkpoints.

Subtitle C (Title XIII) – Interoperable Emergency Communications:

This subtitle complements Title III (and was separately reported out of Commerce Committee as S. 385). It establishes requirements for the National Telecommunications and Information Administration (NTIA), Department of Commerce, regarding its administration of a \$1 billion grant program for interoperable communications systems for first responders. The bill designates grants³⁷ for regional or statewide communications systems designed to permit first responders to talk to one another during an emergency and sets aside funding for a technology reserve for immediate deployment of communications equipment in the event of an emergency or disaster.

This section would provide detailed requirements for NTIA interoperable communications grants. Importantly, it would direct that the grants be awarded based largely on threat and risk factors, with each state guaranteed no more than 0.75% of the funds. The Inspector General would conduct an annual assessment of the grant program. The bill also would require the FCC to report on Emergency Communications back-up systems.

This section requires the FCC to submit a report concerning the status of coordination of cross-border interoperability issues between the United States, Canada, and Mexico. The section would require the report to include the status of efforts regarding rebanding of 800 megahertz radios; communications between the FCC and the Department of State concerning possible amendments to agreements that govern the coordination process for license applications seeking the use of certain channels as identified; additional procedures that can be taken by the FCC to decrease the rejection rate by U.S. entities seeking licenses for use of channels as identified.

Title XIV: Public Transportation Terrorism Prevention:

This title is otherwise known as the “Public Transportation Terrorism Prevention Act of 2007” and originated from the Banking Committee. It makes findings that 182 public transportation systems are primary targets for terrorist attacks, and various other findings. It will require the Federal Transit Administration (part of the Department of Transportation) to provide assessments on public transport security to DHS, and for DHS to allocate grant funds (under section 1404) accordingly.³⁸ These assessments are to be updated for all public transportation agencies at greatest risk to terrorist attack, and are to be used to develop relevant guidelines and strategy. Public transportation agencies will have to establish a security improvement coordinator, who develops plans obtained under DHS grants. DHS would be required to share threat information with Department of Transportation, Information Sharing and Analysis Center for Public Transportation (ISAC) (established under the bill). DHS will “require” at-risk public transportation agencies to participate in ISAC, and would award grants to entities that conduct

³⁷ The Deficit Reduction Act of 2005 required the return of certain spectrums for auction. \$1,000,000,000 of the proceeds from this auction has been allocated for interoperable emergency communications grants. The Call Home Act of 2006 required the Department of Commerce to consult with DHS and release the grants by September 20, 2007. Subtitle C provides makes additional requirements regarding those grants.

³⁸ Necessary funds are authorized for this section for FY2007; \$536,000,000 is authorized for security grants under section 1404(a) for FY2008, \$772,000,000 for FY2009, and \$1,062,000,000 for FY2010.

research into methods to mitigate terrorist threats or attacks against public transportation systems.³⁹

Title XV: Miscellaneous Provisions:

The bill would create a Deputy Secretary of Homeland Security for Management, to be subordinate to the Deputy Secretary of Homeland Security. The new Deputy Secretary of Management, it is thought, will be in a better position (than the current Under Secretary for Management) and have increased authority to handle management issues.⁴⁰ Sec. 1502 provides a sense of the Senate regarding combating domestic radicalization, and section 1503 provides a sense of the Senate regarding oversight of homeland security. Section 1504 requires DHS and GAO to provide Congress with a report on regarding the ongoing initiatives to secure the northern border.

Administration Position

At press time, the Administration had not issued a Statement of Administration Policy (SAP); however, one is anticipated. The Administration did issue a SAP on H.R. 1, the House bill that complements S. 4 (but contains many more objectionable provisions). That SAP is available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1sap-h.pdf>.

Cost

At press time, the Congressional Budget Office had not provided a cost estimate of S. 4; however, it is expected that the estimate will indicate a much lower cost (perhaps \$7 billion) than the cost estimate for H.R. 1 (estimated at a total of \$21 billion of new discretionary spending over the 2007-2012 period).

³⁹ Necessary funds are authorized for this section for FY2007; \$534 mil. for FY2008; \$333 mil. for FY2009; and \$133 mil. for 2010.

⁴⁰ To some extent, this provision is in response to GAO report GAO-07-452T dealing with management challenges at DHS.

Possible Amendments

Motion to Strike TSA collective bargaining provision:

There may be an amendment directed at removing section 803 on the basis that it endangers national security by preventing TSA flexibility to redeploy employees in response to a terrorist incident or natural disaster, without first engaging in collective bargaining.

100 Percent Inspection of Maritime Cargo:

Senator Schumer may again offer the amendment that he offered with the SAFE Port Act, P.L. 109-347, that would require 100-percent scanning of maritime cargo from foreign ports (the amendment failed 61-37). The slowdown in maritime traffic and the few benefits derived from 100-percent scanning are discussed in an RPC policy paper on port security.⁴¹

Delay in implementing provisions of the REAL ID Act:⁴²

S. 563 (or S. 4117) may be offered as an amendment. That bill would delay the provision of the Act that prohibits – *3 years after the enactment of the REAL ID Act* – federal agencies from accepting non-REAL ID drivers' licenses for any official purpose, *to 2 years after promulgation of final regulations on REAL ID*. There may also be amendments to require secure drivers' licenses to vote in elections, to study methods to limit false information in government databases, and provide more DHS resources to assist states to comply with REAL ID regulations.

Terrorist Surveillance Program:

An amendment may be offered to provide telecommunications common carriers with immunity from civil liability stemming from lawsuits brought against the carriers for their alleged support to the government's Terrorist Surveillance Program.

MANPADS:

Senator Boxer may offer an amendment that requires commercial airliners to purchase defensive materials against MANPADS. The provision is likely to cost an estimated \$2 billion.

Visa Waiver Program (VWP):

There may be amendments designed to improve the VWP provisions already in the bill, including conditions for removing a country from the program should security concerns or economic conditions come into being.

Material Support to a Terrorist Organization:

This amendment probably will attempt to narrow the definition of what constitutes a terrorist group for purposes of REAL ID Act's bar to entry to the United States for persons linked to terrorist groups, and will allow suspected terrorists to sue in court to challenge the denial of a waiver to them from the bar.

⁴¹ <http://rpc.senate.gov/files/Sep0606PortSecurityLB.pdf>.

⁴² Note that REAL ID was intended to address 9/11 Commission recommendation #18.

Tools to Combat Terrorism amendments:

There may be amendments that strengthen legal tools (e.g., subpoenas) used by the Department of Justice to combat terrorism.

Agro-terror:

There may be an amendment to enhance defenses against agricultural-based terrorism.

Border Security amendments:

There may be an amendment to enhance the existing program under Immigration & Nationality Act (INA), section 287(g). That provision allows, on a voluntary basis, for state and local law enforcement, to assist DHS in enforcing the immigration laws (e.g., if local police apprehend someone and that person is later determined to be an illegal immigrant, they may transfer control of that person to DHS).

Dock Worker Identification Cards:

There may be an amendment regarding the issuance of Transportation Worker Identification Cards (“TWIC” cards) to dock workers with criminal records. Relevant regulations were issued last year.

Training Dogs for Cargo Inspection:

There may be an amendment regarding certification of canine team training for cargo inspection.